

all third-party telecommunications services or only certain ones? The June 2011 NALs reflect that cramming can affect charges for telecommunications services.³⁸⁹ Industry commenters have already argued that the danger of the “opt-in” approach is that recipients of certain services such as collect calls, directory assistance calls, and inmate facilities calls cannot necessarily be foreseen by the consumer prior to the need for those services, and therefore a consumer would not anticipate needing to opt-in to third-party billing.³⁹⁰ The FTC states that its research suggests that third-party billing on telephone bills has been almost entirely a vehicle for defrauding consumers; therefore, it argues, the Commission should implement a default block which allows consumers to affirmatively “opt-in” to receiving third-party charges on their bills. According to the FTC, this would allow legitimate third parties to use the telephone billing platform only after obtaining the informed consent of the consumer to be charged.³⁹¹

140. We seek additional comment on whether consumers would likely benefit from an “opt-in” mechanism with respect to non-telecommunications-related third-party charges. Specifically, would “opt-in” meaningfully address the problem of cramming? Would consumers adequately anticipate the need for third-party billing before they opt-in or opt-out? If not, how might the Commission and carriers consider addressing consumer education? Are there any analogous opt-in requirements, either in communications or other industries, that might inform our decisions here? Would the benefits to consumers or other factors favoring or disfavoring an opt-in approach be different under one opt-in structure versus another? How and by how much? For example, would an opt-in approach be more or less warranted if it applied only to new consumers as opposed to all consumers, including a carrier’s embedded consumer base?

141. Assuming the Commission decides to adopt an “opt-in” approach, the secondary set of issues revolves around how an “opt-in” measure should be implemented from a practical standpoint. For example, should the Commission adopt an all-or-nothing opt-in where the consumer has an opportunity to opt-in or reject all third-party charges of any type, including long distance and other third-party carrier charges? Alternatively, should the consumer have the choice to opt-in or reject carrier and non-carrier charges separately, or should the consumer have an opportunity to indicate that they choose not to receive third-party billing charges unless or until they are consulted about specific individual charges from third parties? For example, the Mobile Marketing Association’s “U.S. Consumer Best Practices” establish procedures for acquiring consumer consent to charges for additional services— including through “opt-in” or “double opt-in” mechanisms – in the context of short codes for text messaging.³⁹² Additionally, with respect to procedure, there is the question of the best format for implementing the “opt-in” mechanism. We seek comment on whether the carrier should be required to obtain consumer approval for third-party charges via a letter of authorization (“LOA”) or to obtain verbal consent made to a third-party verifier (“TPV”). For example, multiple states’ attorneys general commenting in this proceeding indicated that consumers should be required to provide consent directly to the telephone company from the consumer’s own telephone line used for the billing account, with identity confirmation by use of either the full telephone account number or a password selected by the consumer.³⁹³ We seek comment on the best procedures to obtain a consumer’s opt-in to third-party charges, including other alternatives to those mentioned here.

³⁸⁹ See June 2011 NALs.

³⁹⁰ See BSG Comments at 2-3.

³⁹¹ See FTC Comments at 5-6.

³⁹² See MMA Best Practices.

³⁹³ See 17 Attorneys General Comments at 25-26.

142. Also with respect to implementation, we are aware that some carriers and billing aggregators have concerns over the costs associated with implementing an “opt-in” requirement.³⁹⁴ However, other commenters argue that any associated costs are not burdensome, particularly when measured against the anticipated benefit to consumers.³⁹⁵ We seek comment on the specific costs of the measures we discuss in this *Further Notice*, and ways we might mitigate any implementation costs. For example, should opt-in be limited to just those wireline carriers that currently offer blocking of non-carrier third-party charges? Do smaller wireline carriers face unique implementation costs and, if so, how might we address those concerns? Should the Commission limit any opt in requirement to new consumers rather than a carrier’s embedded base of consumers? If “opt-in” should only apply to new consumers or some other subset of existing consumers, then what is the basis – both factual and legal – for such a distinction? What are the distinguishing characteristics of each subset of consumers and their respective risk of being crammed that may justify disparate treatment? For example, recently Verizon announced a proposed settlement with its consumers to address cramming complaints it has received. Under the proposed settlement, Verizon will implement an “opt-in” requirement for new consumers by requiring, at the point of sale, consumers to give or withhold permission for Verizon to place third-party charges on their bills, and will provide notices on its bills to current consumers regarding the opportunity to “opt-out” by requesting blocking. We seek comment on whether a similar approach would be appropriate should the Commission adopt an “opt-in” requirement.

143. We also seek comment on the issue of where and when a consumer should be made aware of the opportunity to opt-in to third-party billing charges. Should we require carriers to inform the consumer at the point of sale, such as during the telephone conversation between the consumer and the carrier’s customer service representative or while using online sign-up procedures, about blocking and the opportunity to opt-in to third-party charges? Should notification of the possibility of third-party charges and the option to opt-in to those types of charges also be required to appear in website, print, or in-store advertising? Additionally, should existing consumers be informed of the possibility of third-party charges on their bill and provided instructions or information as to how to opt-in or decline those charges? Furthermore, once a consumer has opted-in to receive third-party charges on their bill, should the consumer’s current opt-in status be disclosed on every bill so that he or she will know whether to be looking for such charges on that bill?

144. We seek comment regarding the duration of each opt-in approval and what happens when a consumer decides to revoke a prior opt-in approval or to give new opt-in approval. Does the opt-in election continue in effect for the duration of service, until changed by the consumer, or some other time? Assuming that there should be a mechanism for a consumer to change an opt-in election with respect to receiving third-party charges, what procedures should be required to effectuate such a change? We seek comment on the potential ways to effectuate a change in consumer opt-in status with respect to some or all third-party charges.

145. We seek comment regarding the scope of each opt-in approval. Should a consumer be able to opt-in to specific types of third-party charges, *e.g.*, from charitable organizations, from a specific third party, or for a specific period of time? Do carriers have the technical ability to distinguish such charges today and, if not, what would be the cost to obtain that ability? Some of the state attorneys general commenting in this proceeding suggested that if a consumer opts to remove the block for a specific vendor, the carrier should be required to clearly and conspicuously disclose that this may expose

³⁹⁴ See ISG Reply Comments at 5; Leap Comments at 5; MetroPCS Communications, Inc. Comments at 7; Verizon Comments at 9-11; CCTM Comments at 2; PayTel Comments at 1; US Telecom Comments at 5; Central Telecom Long Distance Comments at 5.

³⁹⁵ See ILT Teleservices Comments at 5; NASUCA Comments at 16.

the consumer to unauthorized charges.³⁹⁶ We seek comment on the level of consumer interest in this type of “opt-in” approach, the potential consumer benefits, as well as the complexity and costs such a scenario poses for carriers.

146. We seek comment on whether there might be additional measures we could take to combat cramming. Specifically, are there measures beyond an “opt-in” approach or alternative approaches that we should consider and might be more effective at combating cramming? As we noted in the Report and Order, cramming appears to be less a problem for CMRS consumers than for wireline consumers, but it may be on the rise. We recognize commenter concerns that wireless cramming is growing, and therefore seek comment on potential regulatory and non-regulatory measures to address the issue. Are there technological solutions that might help consumers, such as apps for mobile phones, that could help consumers avoid cramming? What steps has industry taken to date and what steps might it take in the future to protect CMRS consumers? In light of the record in this proceeding, are there any steps the Commission should consider to help CMRS consumers combat cramming? Moreover, to the extent that cramming issues develop for VoIP services, we request that commenters provide us with information about that issue and answer the relevant questions above, including how the Commission should address such issues. Finally, commenters should address implementation costs of any other proposed anti-cramming measures along with any questions of the Commission’s legal authority to adopt such measures.

147. Finally, we seek comment on the respective roles of carriers and billing aggregators in screening charges for purposes of existing blocking options and how these roles might change if we were to adopt an “opt-in” requirement. The *Senate Staff Report* indicates that billing aggregators act as intermediaries that funnel charges from various third parties to the carrier serving the consumer to be billed.³⁹⁷ In addition, information in the record indicates that both carriers and billing aggregators perform their own screening functions to identify third parties who are the subject of an excessive number of cramming complaints.³⁹⁸ It therefore appears that billing aggregators perform both a sorting function and a screening function. This raises the question of the extent to which carriers or billing aggregators actually perform the screening necessary to block third-party charges under the blocking options carriers currently offer. It also raises the question of whether and to what extent carriers or billing aggregators would actually be in a position to perform the screening necessary to block charges even if we were to adopt an opt-in requirement.

148. We request that commenters provide specific information when addressing costs, benefits, implementation issues, and related matters. As discussed in the *Report and Order*, it is difficult to meaningfully assess general assertions regarding such issues and to balance competing claims that rely only on general assertions. General assertions are less persuasive than comments that provide specific information that quantifies dollar amounts of asserted costs or benefits, that estimates timeframes, or that explains the steps that must be taken in order to accomplish a particular objective.

149. *Legal Authority.* We acknowledge that the proposals in this *Further Notice* go beyond bill formatting and transparency. We seek comment on our authority to adopt an “opt-in” requirement for all or a sub-set of wireline carriers, and for all or a sub-set of wireline consumers. Would the Commission’s section 201(b) authority to regulate practices “for and in connection with” telecommunications services support such requirements? Does the Commission’s Title I ancillary

³⁹⁶ See *id.* at 26.

³⁹⁷ See *Senate Staff Report* at 8.

³⁹⁸ See BSG Comments at 5-6; BVO Reply Comments at 5-6; CenturyLink Comments at 12-13; Frontier Comments at 10; PaymentOne Comments at 10-12.

authority provide support for such requirements? Are there other sources of authority for these measures? Would such measures present First Amendment concerns beyond those posed by the rules we adopt in the *Report and Order*? If so, how might we address those concerns? Are there legal considerations that would limit or support the Commission's authority to apply an opt-in requirement only to certain carriers or to certain consumers, such as new consumers versus all consumers? We also seek comment on whether there exist any other concerns regarding whether the Commission has the legal authority over the concepts discussed in this further notice

VII. PROCEDURAL MATTERS

A. Report and Order

1. Final Regulatory Flexibility Analysis

150. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),³⁹⁹ the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Report and Order*. The FRFA is set forth in Appendix C.

2. Final Paperwork Reduction Act Analysis

151. This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13 (44 U.S.C. 3501-3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the *Federal Register* inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program carriage complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix C, *infra*.

3. Congressional Review Act

152. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

B. FNPRM

1. Initial Regulatory Flexibility Act Analysis

153. With respect to this *Further Notice*, an Initial Regulatory Flexibility Certification ("IRFA") is contained in Appendix D. As required by Section 603 of the RFA,⁴⁰⁰ the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in the *Further Notice*. Written public comments are requested on the IRFA. Comments must be identified as responses

³⁹⁹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 ("CWAAA").

⁴⁰⁰ See 5 U.S.C. § 603.

to the IRFA and must be filed by the deadlines for comments on the *Further Notice*. The Commission will send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁴⁰¹

2. Paperwork Reduction Act

154. This *Further Notice* contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.⁴⁰² In addition, pursuant to the Small Business Paperwork Relief Act of 2002,⁴⁰³ we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”⁴⁰⁴

3. Ex Parte Rules

155. Permit-But-Disclose. This *Further Notice* proceeding will be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁴⁰⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

4. Filing Requirements

156. Comments and Replies. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

⁴⁰¹ See 5 U.S.C. § 603(a). In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

⁴⁰² Pub. L. No. 104-13.

⁴⁰³ Pub. L. No. 107-198.

⁴⁰⁴ 44 U.S.C. § 3506(c)(4).

⁴⁰⁵ 47 C.F.R. §§ 1.1200 *et seq.*

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

157. Accessibility Information. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

158. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

159. Additional Information. For additional information on this proceeding, contact Lynn Ratnavale, Lynn.Ratnavale@fcc.gov or (202) 418-1514, or Melissa Conway, Melissa.Conway@fcc.gov (202) 418-2887, of the Consumer and Governmental Affairs Bureau, Consumer Policy Division.

VIII. ORDERING CLAUSES

A. Report and Order

160. **IT IS ORDERED**, pursuant to the authority found in sections 1-2, 4, 201, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-152, 154, 201, 303(r), and 403, this *Report and Order* **IS ADOPTED**.

161. **IT IS FURTHER ORDERED** that, pursuant to the authority found in sections 4, 201, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 154, 201, 303(r), and 403 the Commission's rules **ARE ADOPTED** as set forth in Appendix A.

162. **IT IS FURTHER ORDERED** that the requirements of this *Report and Order* **WILL BECOME EFFECTIVE** as specified in paragraph 113 herein. The rules contain new or modified information collection requirements that require approval by the Office of Management and Budget under

the Paperwork Reduction Act and **WILL BECOME EFFECTIVE** after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective dates.

163. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

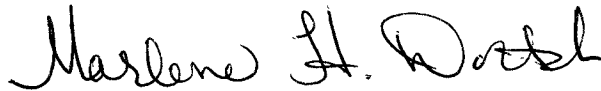
164. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

B. FNPRM

165. **IT IS ORDERED** that pursuant to the authority contained in sections 1-2, 4, 201, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-152, 154, 201, and 403, this *Further Notice of Proposed Rulemaking* **IS ADOPTED**.

166. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A**Final Rules**

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 64 – Subpart Y – Truth-in-Billing Requirements for Common Carriers

1. The heading for Subpart Y is revised to read as follows:

Subpart Y – Truth-in-Billing Requirements for Common Carriers; Billing for Unauthorized Charges

2. Section 64.2400 is amended by revising paragraph (b) to read as follows:

(b) These rules shall apply to all telecommunications common carriers and to all bills containing charges for intrastate or interstate services, except as follows:

(1) Sections 64.2401(a)(2), 64.2401(a)(3), 64.2401(c), and 64.2401(f) shall not apply to providers of Commercial Mobile Radio Service as defined in § 20.9 of this chapter, or to other providers of mobile service as defined in § 20.7 of this chapter, unless the Commission determines otherwise in a further rulemaking.

(2) Sections 64.2401(a)(3) and 64.2401(f) shall not apply to bills containing charges only for intrastate services.

3. Section 64.2401 is amended by renumbering subparagraph (a)(3) as (a)(4), inserting a new subparagraph (a)(3), and adding a new paragraph (f) to read as follows:

§ 64.2401 Truth-in-Billing Requirements.

(a) *Bill Organization.* Telephone bills shall be clearly organized, and must comply with the following requirements:

* * * * *

(3) Carriers that place on their telephone bills charges from third parties for non-telecommunications services must place those charges in a distinct section of the bill separate from all carrier charges. Charges in each distinct section of the bill must be separately subtotaled. These separate subtotals for carrier and non-carrier charges also must be clearly and conspicuously displayed along with the bill total on the payment page of a paper bill or equivalent location on an electronic bill. For purposes of this subparagraph “equivalent location on an electronic bill” shall mean any location on an electronic bill where the bill total is displayed and any location where the bill total is displayed before the bill recipient accesses the complete electronic bill, such as in an electronic mail message notifying the bill recipient of the bill and an electronic link or notice on a website or electronic payment portal.

(4) The telephone bill must clearly and conspicuously identify any change in service provider, including identification of charges from any new services provider. For purpose of this subparagraph “new service provider” means a service provider that did not bill the subscriber for

service during the service provider's last billing cycle. This definition shall include only providers that have continuing relationships with the subscriber that will result in periodic charges on the subscriber's bill, unless the service is subsequently canceled.

* * * * *

(f) *Blocking of third-party charges.*

(1) Carriers that offer subscribers the option to block third-party charges from appearing on telephone bills must clearly and conspicuously notify subscribers of this option at the point of sale, on each telephone bill, and on each carrier's website.

APPENDIX B**Comments Filed**

Due to the significant number of comments filed by individual consumers in this proceeding, we have listed below only those comments received from industry, consumer advocacy groups, and governmental entities. All individual consumer comments, including those cited in the Report and Order, are available for inspection on the Commission's Electronic Comment Filing System ("ECFS").

American Roaming Network, Inc.
AT&T, Inc.
Attorneys General of Illinois, Nevada, and Vermont
Billing Concepts, Inc. d/b/a BSG Clearing Solutions (BSG)
Bizz Links
Business Discount Plan, Inc. (BDP)
Business Online Pages, Inc. (BOP)
Business Values Online, Inc. (BVO)
California Public Utilities Commission (CPUC)
Central Telecom Long Distance, Inc.
CenturyLink
Coalition for a Competitive Telecommunications Market (CCTM)
Consumer Telecom, Inc. (CTI)
Consumers Union, Center for Media Justice, et al. (Public Interest Commenters)
Critical Messaging Association
CTIA
Federal Trade Commission (FTC)
Florida Attorney General Pam Bondi (Florida AG)
Frontier Communications Corporation (Frontier)
ILD Teleservices
Independent Telephone & Telecommunications Alliance (ITTA)
Indiana Utility Regulatory Commission (IURC)
Internet Business Association (IBA)
Internet Searches Group (ISG)
Internet Search Optimization Group (ISO)
Iowa Utilities Board
Leap Wireless International, Inc. and Cricket Communications, Inc. (Leap Wireless)
LocalBiz USA
MetroPCS Communications, Inc.
Michigan Public Service Commission
Minnesota Attorney General
National Association of State Utilities Consumer Advocates (NASUCA)
National Association of Regulatory Utility Commissioners (NARUC)
National Consumers League (NCL)
Nebraska Public Service Commission
New England Commissions (NEC)
Online Business Association (OBA)
PaymentOne Corporation
Pay Tel Communications, Inc.
Personal Content Protection (PCP)
Preferred Long Distance, Inc.
Rocket Communication Services, Inc.

Search Engine Plus (SEP)
Securus Technologies, Inc.
Sprint Nextel Corporation
TCA
Tennessee Regulatory Authority
Tim McAteer, President, General Mgr. Inmate Calling Solutions
T-Mobile USA, Inc.
U.S. Telecom Inc. (US Telecom)
Verizon and Verizon Wireless (Verizon)
Virginia State Corporation Commission Staff
Voice on the Net (VON) Coalition
Wheat State Telephone, Inc. (Wheat State)
17 State Attorneys General
1800 Collect, Inc.

Reply Comments Filed

AT&T, Inc.
Billing Concepts, Inc. d/b/a BSG Clearing Solutions (BSG)
Business Online Pages, Inc. (BOP)
Business Values Online, Inc. (BVO)
Coalition for a Competitive Telecommunications Market (CCTM)
Consumers Union, Center for Media Justice, et al. (Public Interest Commenters)
CTIA
Internet Business Association (IBA)
Internet Searches Group (ISG)
Internet Search Optimization Group (ISO)
Mancuso, James L.
Montana Public Service Commission
NASUCA
National Consumers League (NCL)
National Telecommunications Cooperative Association (NTCA)
Online Business Association (OBA)
PaymentOne Corporation
Personal Content Protection (PCP)
Search Engine Plus (SEP)
Verizon and Verizon Wireless (Verizon)
1800 Collect, Inc.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking released by the Federal Communications Commission (Commission) on July 13, 2011.² The Commission sought written public comments on the proposals contained in the *NPRM*, including comments on the IRFA. None of the comments filed in this proceeding were specifically identified as comments addressing the IRFA; however, comments that address the impact of the proposed rules and policies on small entities are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Order

2. The record compiled in this proceeding, including the Commission's own complaint data, confirms that cramming⁴ is a significant and ongoing problem that has affected wireline consumers for over a decade, and drawn the notice of Congress, states, and other federal agencies. The substantial volume of wireline cramming complaints that the Commission, FTC, and states continue to receive underscores the ineffectiveness of voluntary industry practices and highlights the need for additional safeguards. Recent evidence, such as the volume of wireless cramming complaints and wireless carriers' settlement of litigation regarding unauthorized charges, raises a similar concern with unauthorized charges on Commercial Mobile Radio Service (CMRS) bills, such as those of providers of wireless voice service.

3. Although the Commission has addressed cramming, i.e. the placement of unauthorized charges on telephone bills, as an unreasonable practice pursuant to Section 201(b) of the Act,⁵ there are currently no rules that specifically address this practice. We believe that adopting these new rules will provide consumers with the safeguards they need to protect themselves from this risk.

4. In this *Report and Order (Order)*, the Commission adopts measures under the Commission's Truth-in-Billing rules to help consumers detect and prevent the placement of unauthorized charges on their telephone bills, an unlawful and fraudulent practice commonly referred to as "cramming."⁶ Specifically, to summarize the rules adopted, we adopt rules that (1) address the need for

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (*SBREFA*), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170, Notice of Proposed Rulemaking, 26 FCC Rcd 10021 (2011) (*NPRM*).

³ See 5 U.S.C. § 604.

⁴ "Cramming" is defined as the practice of placing the unauthorized third-party charges on a consumer's telephone bill.

⁵ See, e.g., *Long Distance Direct, Inc.*, File No. ENF-99-01, Memorandum Opinion and Order, 15 FCC Rcd 3297 (2000) (assessing a forfeiture for slamming and cramming violations pursuant to sections 201(b) and 258). "Slamming" is the unlawful practice of changing a subscriber's selection of a provider of telephone service without that subscriber's knowledge or permission.

⁶ See 47 U.S.C. § 201; 47 C.F.R. §§ 64.2400-64.2401.

additional safeguards for wireline telephone consumers that build on existing industry efforts to prevent cramming and (2) that are necessary to enable consumers to further detect cramming when it occurs and then prevent it. Specifically, we revise our rules to require wireline carriers that currently offer blocking of third-party charges to clearly and conspicuously notify consumers of this option on their bills, websites, and at the point of sale; to place non-carrier third-party charges in a distinct bill section separate from all carrier charges; and to provide separate totals for carrier and non-carrier charges.⁷

5. We believe the rules the Commission has adopted in the Order strike an appropriate balance between maximizing consumer protection and avoiding imposing undue burdens on carriers and billing aggregators. These rules avoid imposing the undue burden on consumers of eliminating third-party billing as a convenient means by which to receive charges. Consumers will still have access to third-party billing, but information about their option to block third-party charges will be more readily available to them should they choose to not allow third-party charges on their bill. Additionally, these rules avoid the imposition of undue burdens on small carriers that would raise their billing costs to an extent that would inhibit their businesses' ability to remain competitive and perhaps stifle innovation in the marketplace. The imposition of significant costs to billing and network systems without any additional benefit to consumers would be unwise. Therefore, we believe this strikes the necessary balance between the two alternatives. Furthermore, optional blocking is a service many carriers and billing aggregators already make available to consumers and our requirements will simply make the information about blocking more obvious to consumers when they sign up for telephone service. Additionally, requiring a separate section and separate totals for third-party non-carrier charges will also make it easier for a consumer to identify exactly the services for which they are being charged without requiring an entirely separate bill or the elimination of such charges from bills.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. There were no comments filed in direct response to the IRFA. Some commenters, however, raised issues and questions about the impact the proposed rules and policies would have on small entities.

7. Point of Sale Disclosure of Blocking Options. There is significant record support for this approach. Although the state attorneys general, many state public utility commissions, and public interest commenters generally believe that the Commission should adopt additional measures to combat cramming, these groups support more disclosure to and the education of consumers as a general matter.⁸ Some state public utility commissions support the proposed disclosure requirement regarding blocking as outlined by the Commission.⁹ In fact, a few state commissions emphasize the importance of a point of sale disclosure.¹⁰ The Iowa Utilities Board suggests that if carriers were to actively promote the blocking capability, then cramming complaints would be "reduced substantially."¹¹ NARUC urges the

⁷ *Id.*

⁸ *See, e.g.,* National Consumers League Comments at 7.

⁹ *See, e.g.,* IURC Comments at 3 (informing consumers of the ability to block third-party charges would be of significant benefit to Indiana consumers).

¹⁰ *See, e.g.,* Tennessee Regulatory Authority Comments at 2 (supporting the Commission's proposal to require carriers to inform consumers of third-party blocking services, but suggesting that disclosure on the bill is unnecessary whereas disclosure at the point of sale is uniquely helpful to consumers).

¹¹ *Id.*

Commission to require all carriers disclose third-party blocking options to their consumers.¹² Some billing companies also support the Commission's proposed disclosure of blocking requirement.¹³ Several billing aggregators do not oppose proposals to improve disclosure and clarify the procedures for offering third-party blocking services provided that the proposed changes do not go beyond the format of the bills or increase the carriers' costs.¹⁴ The FTC acknowledges that improved billing disclosures would benefit consumers who receive third-party charges on their bills.¹⁵

8. Some carriers generally oppose clear and conspicuous disclosure of existing blocking options. These carriers claim that required methods of disclosure in terms of format or medium would interfere with bill formatting flexibility, be unnecessary, or be costly.¹⁶ CenturyLink recommends that the Commission not mandate the disclosure of blocking options at the point of sale or on each bill, but rather start with required disclosure of blocking options on the website and on bill inserts.¹⁷ CenturyLink claims that verbal disclosures about blocking at the point of sale or point of contact will be expensive and potentially irrelevant to some consumers.¹⁸ Similarly, ITTA contends that the Commission should not require disclosure on every bill or at the point of sale because only a small percentage of consumers are likely to need or use this information in any given month and disclosure runs counter to efforts to reduce billing costs.¹⁹ Regarding the point of sale, ITTA suggests that a disclosure requirement would be overly broad and add to subscriber confusion.²⁰ NTCA cautions against mandatory changes to billing formats or customer notification requirements for small rural carriers because they would be extremely expensive to implement and provide little benefit.²¹ Despite these comments nothing in the record convinces us that it will be unduly burdensome or costly for carriers to implement this requirement – especially since we are granting carriers the implementation flexibility they requested – given that it appears from the record that many or most carriers already offer blocking and, based upon the record, appear to notify consumers of blocking options when consumers dispute unauthorized charges. Thus, many carriers will be required only to expand their existing notification.

9. We note that, despite the carriers' collective concern about the cost of implementing specific disclosure requirements concerning blocking on the bill and at the point of sale, one rural carrier,

¹² NARUC Reply Comments at 4-5 (suggesting that all voice service providers disclose blocking options on, at least, an annual basis, and that all required disclosures be clear and conspicuous).

¹³ See, e.g., PaymentOne Corporation Comments at 17.

¹⁴ See, e.g., BVO Comments at 1-2.

¹⁵ *Id.* at 6.

¹⁶ See, e.g., AT&T Comments at 14 (would not oppose a disclosure requirement provided that AT&T would not have to change its existing processes and would have the flexibility to determine the format and manner in which the disclosure is made); BVO Comments at 1-2 (does not oppose improvement of information on bills and clarification of blocking options so long as it does not increase cost to the LEC or go beyond the format of the bills).

¹⁷ CenturyLink Comments at 6.

¹⁸ *Id.* at 7-9. CenturyLink estimates that the additional cost to fully describe third-party billing and disclose a subscriber's blocking option during a point of sale communication would cost the company over \$3 million a year. See *id.* at 8 n.16.

¹⁹ ITTA Comments at 4.

²⁰ *Id.*

²¹ NTCA Comments at 2.

Wheat State, supports the Commission's proposed rule requiring notification at the point of sale, on each bill, and on their websites of the option to block third-party charges.²² Frontier also supports the Commission's proposal that carriers clearly and conspicuously notify consumers of third-party blocking features.²³ Although Frontier cautions against the imposition of specific formats or medium for such disclosures, Frontier states that disclosure of third-party blocking is an "important" consumer protection measure and consumer education is "paramount."²⁴

10. In this Report and Order we are adopting a requirement that carriers that already offer blocking simply disclose that option at point of sale so that consumers receive the benefit of better information. In fact, we note that most ITTA member companies offer blocking,²⁵ some small carriers require written subscriber approval before they will place third-party charges on their bills to consumers,²⁶ and all of the carriers that provided information to the Senate Commerce Committee indicated that they offer some sort of blocking upon subscriber request.²⁷ We also note that publicly available information indicates that some carriers already post information about blocking options on their websites.²⁸ Further, we anticipate that implementation costs will be offset, at least in part, by reductions in the number of subscriber calls to carriers' customer service representatives because of the anticipated reduction in the number unauthorized charges consumers will have to dispute. CenturyLink's estimate that making point-of-sale disclosures will cost it approximately \$3 million annually in additional customer service labor costs does not account for the reduced labor costs associated with having the same customer service representatives handling cramming calls from consumers and therefore likely overstates net costs. It is conceivable that carriers could experience a net reduction in such costs. Even AT&T, which is a strong proponent of flexibility, notes that commenters "generally support notifying consumers of third-party blocking options and separating their charges from third-party charges on the bill."²⁹

11. We believe that granting wireline carriers this flexibility will better enable them to customize their disclosures to their blocking capabilities while avoiding potential confusion or inaccuracies that could occur if we were to adopt additional requirements. Consistent with our existing Truth-in-Billing rules, we afford carriers the flexibility to implement this requirement in the manner that best accomplishes the goal of the rule within the context of each carrier's individual website, bill, and point-of-sale scripts.³⁰ This flexibility should enable carriers to avoid unnecessary marketing and billing costs while still providing effective disclosures to their consumers. Each carrier's disclosures must accurately reflect the current capabilities of its blocking options.

²² Wheat State Comments at 2.

²³ Frontier Comments at 2.

²⁴ *Id.*

²⁵ ITTA Comments at 2.

²⁶ Iowa Utilities Board Comments at 9.

²⁷ *Senate Staff Report* at 33.

²⁸ See <http://www.frontier.com/blockingoptions/> (visited March 8, 2012). We note these websites only to demonstrate that some carriers already voluntarily provide some notification about blocking options, but we do not offer any opinion as to whether any current, specific type of disclosure would comply with the rules we adopt herein.

²⁹ AT&T Reply Comments at 12.

³⁰ See *First Truth-in-Billing Order*.

12. Separate Section of Bill for Non-Carrier Third Party Charges. We adopt the requirement that where charges for one or more service providers that are not carriers appear on a telephone bill, the charges must be placed in a distinct section of the bill separate from all carrier charges. We believe this requirement is critical to enabling consumers to detect the most common types of unauthorized charges on their telephone bills. There is significant support for greater separation of bill charges. Some public interest groups encourage the Commission to strengthen our rules regarding the separation of third-party charges on the bill in addition to adopting an opt-in requirement whereby a consumer would have to affirmatively elect to receive third-party charges on their bill.³¹ Some state public utility commissions and state attorneys general go further in their support of a separation of charges requirement and recommend that third-party charges appear separately in the body of the bill and be separately identified on the first page of the subscriber's bill.³² Some commenters argue that greater bill separation will not be effective to combat cramming. The FTC submits that recent enforcement actions have shown that placing third-party charges in a separate section of the bill did not help consumers prevent or identify the crammed charges.³³ Most of the state attorneys general argue that the separation of third-party charges – that most carriers already practice – has proven totally ineffective in adequately alerting consumers to the existence of third-party charges.³⁴ They claim that the separation of third-party charges does not address the “root problem” of cramming and “merely makes it somewhat less likely that the phone bill cramming will go unnoticed for several months.”³⁵ We disagree. While we acknowledge that changes to bill format may not, standing alone, be enough to protect consumers against cramming, the requirement we adopt today should make it easier for consumers to detect unauthorized charges on their bills that are described so as to appear to be for a subscription telecommunications service, a common tactic used to hide unauthorized charges.

13. We also clarify, as we noted in the *NPRM*, that the rules adopted herein do not change anything with respect to carrier billing for bundles.³⁶ The record indicates that cramming is not a significant problem for bundles. Further, it likely would be extremely confusing to consumers, and make it difficult for them to verify whether they are being billed the correct price, if they were billed for a bundle as if they were buying each service ala carte. For purposes of this rule, the facts that the bundle is marketed by the carrier as its product, is marketed as a single product at a single price, and includes telecommunications services provided by the carrier, is sufficient for the bundle to be treated as a carrier charge.

14. Separate Totals for Carrier and Non-Carrier Charges. We also require carriers in the Report and Order to clearly and conspicuously disclose separate subtotals for charges from carriers and charges from non-carrier third-parties on the payment page of their bills. For consumers who do not receive a paper bill, these subtotals must be clearly and conspicuously displayed in an equivalent location and in any bill total that is provided to the subscriber before the subscriber has opportunity to access an electronic version of the bill, such as in a transmittal email message or on a webpage. The record is clear

³¹ Public Interest Commenters Reply Comments at 4-5.

³² See, e.g., Florida AG Comments at 2 (third-party charges should appear on the first page of the bill where the total charges are disclosed, and also on a separate page of the bill solely dedicated to third-party charges); Nebraska PSC Comments at 3.

³³ FTC Comments at 4-5.

³⁴ 17 State Attorneys General Comments at 19.

³⁵ Attorneys General of IL, NV and VT Comments at 9.

³⁶ “Bundled services” are various types of services, such as telephone, cable and Internet services, that are offered and billed by a single entity, even though they may be provisioned by multiple parties.

that one of the reasons consumers have difficulty detecting unauthorized charges is that these charges often are at or near the end of bills that may run into ten or more pages. Several commenters share this concern. By requiring separate subtotals on the payment page, which usually is the first page of a paper bill, we address these concerns and guard against the unintended consequence that the requirement to place non-carrier third-party charges in a distinct section of the bill could be implemented in a way that exacerbates problems associated with such charges being near the end of a bill. Requiring separate subtotals on the payment page also helps to alert consumers that their bill contains non-carrier third-party charges and that these charges are detailed in a distinct section of the bill. Thus, this requirement helps consumers to take advantage of the requirement to place non-carrier third-party charges in a distinct bill section and addresses the problem identified in the *NPRM* that consumers often are unaware that their bills can include non-carrier third-party charges. We note that the majority of state Attorneys General support this requirement and recommend that the total amount of third-party charges be disclosed on the summary of charges appearing at the very beginning of the subscriber's bill.³⁷ This requirement also should help consumers to be aware that their telephone bills may contain non-carrier charges, including charges for things wholly unrelated to the telecommunications services they purchase from carriers.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

15. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.³⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³⁹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁴⁰ Under the Small Business Act, a "small business concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) satisfies any additional criteria established by the Small Business Administration (SBA).⁴¹

16. *Incumbent Local Exchange Carriers ("Incumbent LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴² Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1000 or more. According to Commission data, 1,307 carriers reported that

³⁷ *Id.*

³⁸ 5 U.S.C. § 604(a)(3).

³⁹ 5 U.S.C. § 601(6). Generally, the Small Business Administration, Office of Advocacy, defines a small business as an independent business having fewer than 500 employees. See <http://www.sba.gov/sites/default/files/sbfaq.pdf>.

⁴⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comments, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

⁴¹ 15 U.S.C. § 632.

⁴² 13 C.F.R. § 121.201, NAICS code 517110.

they were incumbent local exchange service providers.⁴³ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.⁴⁴ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the Notice. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small.⁴⁵

17. *Competitive Local Exchange Carriers ("Competitive LECs"), Competitive Access Providers ("CAPs"), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁶ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.⁴⁷ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.⁴⁸ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.⁴⁹ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.⁵⁰ In addition, 72 carriers have reported that they are Other Local Service Providers.⁵¹ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.⁵² Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the Notice.

18. *Billing Aggregators.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of billing aggregation services. The appropriate size standard under SBA rules is for the category Other Telecommunications Services and or Data Processing, Hosting and Related Services. Under those size standards, such a business is small if it has revenue of \$25 million or less annually.⁵³ Based upon the information provided by the commenting billing

⁴³ See Trends in Telephone Service at Table 5.3.

⁴⁴ See *id.*

⁴⁵ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁴⁶ 13 C.F.R. § 121.201, NAICS code 517110.

⁴⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁴⁸ See Trends in Telephone Service at Table 5.3.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ 13 C.F.R. § 121.201, NAICS codes 517919 and 518210.

aggregators,⁵⁴ the Commission estimates that the majority of billing aggregators are small entities that may be affected by rules adopted pursuant to the Notice.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

19. The rules adopted herein require that (1) wireline carriers to notify subscribers clearly and conspicuously, at the point of sale, on each bill, and on their websites, of the option to block third-party charges from their telephone bills, if the carrier offers that option; (2) require wireline carriers to place charges from non-carrier third-parties in a bill section separate from carrier charges; and (3) require wireline carriers to clearly and conspicuously disclose separate subtotals for charges from carriers and charges from non-carrier third-parties on the payment page of their bills.

20. These rules may necessitate that some common carriers make changes to their existing billing formats and/or disclosure materials. For example, to provide a separate section for non-carrier third-party charges and a separate total for non-carrier charges may necessitate changes to billing formats.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

21. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”⁵⁵

22. Point of Sale Disclosure of Blocking Options. In this *Order*, the Commission adopts a requirement that carriers notify consumers of their options to block non-carrier third-party charges from their telephone bills.⁵⁶ Although we acknowledge that this requirement imposes some costs on small carriers, we are limiting the requirement to disclosure of already existing blocking options. This limitation significantly reduces the compliance burden for all carriers, including small carrier entities. Furthermore, in adopting the disclosure requirement, the Commission also concluded that the costs imposed upon carriers are outweighed by the fact that consumers would be significantly more protected from crammed charges appearing on their telephone bills.

23. Separate Section of Bill for Non-Carrier Third Party Charges. In this *Order*, we amend our rules to require that when one or more service providers that are not carriers appear on a telephone bill, the charges must be placed in a distinct section of the bill separate from all carrier charges. Some carriers argued that the separation of charge is ineffective⁵⁷ and that any new regulation would increase costs, thus hampering competition in the industry.⁵⁸ We acknowledge that this rule places some burden

⁵⁴ See, e.g., PaymentOne Corporation Comments at 1.

⁵⁵ 5 U.S.C. § 603(c)(1)-(c)(4).

⁵⁶ See *Order supra* ¶48.

⁵⁷ See Attorneys General of IL, NV and VT Comments at 9

⁵⁸ See, e.g., BSG Comments at 2-3; BOP Reply Comments at 2-5; ISO Comments at 2; OBA Reply Comments at 2-4.

on carriers, but we believe that the burden is mitigated because we do not mandate any specific format. Moreover, carriers have flexibility to develop their own solutions that comply with the rule as best works for the size and their particular billing system, thereby reducing the burden associated with the rule the Commission adopts in this Order. Furthermore, we believe it will make it much easier for consumers to identify the charges on their bill that the record suggests are most likely to be crammed.

24. *Separate Totals for Carrier and Non-Carrier Charges.* We also require carriers to clearly and conspicuously disclose separate subtotals for charges from carriers and charges from non-carrier third-parties on the payment page of their bills. The separate totals requirement is part and parcel of the separation section for non-carrier third-party charges. Although we did not receive any comments stating that this rule would cause a significant economic impact on small businesses, we acknowledge that changing the billing format in any way imposes some costs upon the carrier. However, we have determined that the benefit to consumers in making their bills more clear and usable outweighs the burden on the carrier.

25. We specifically identified two alternatives to the rules adopted in this Order for the purpose of reducing the economic impact on small businesses. First we considered requiring all carrier to offer blocking. Second, we considered requiring a specific bill format. However, we rejected both of these alternatives because they are more costly to small businesses.

REPORT TO CONGRESS: The Commission will send a copy of the *Order*, including this FRFA, in report to be sent to Congress pursuant to the Congressional Review Act.⁵⁹ In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.⁶⁰

⁵⁹ See 5 U.S.C. § 801(a)(1)(A).

⁶⁰ See 5 U.S.C. § 604(b).

APPENDIX D

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended, ("RFA"),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rule Making ("FNPRM"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided on the first page of this document. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.² In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. The *Further Notice* contains proposals that: (1) a carrier, if it offers blocking, ask all new subscribers whether they would like to "opt-in" to blocking of third-party charges on their bills and record the subscriber's election for purposes of blocking or not blocking third-party charges on that subscriber's bill; and (2) carriers include on all telephone bills and on their websites, for use by existing customers, information about the option to block third-party charges from their telephone bills and record any subsequent request by a current customer to block or not block third-party charges on that subscriber's bill.

3. The record compiled in this proceeding reflects that cramming primarily has been an issue for wireline telephone customers. The record compiled in this proceeding, including the Commission's own complaint data, confirms that cramming is a significant and ongoing problem that has affected wireline consumers for over a decade, one that has drawn the notice of Congress, states, and other federal agencies. The substantial volume of wireline cramming complaints that the Commission, FTC, and states continues to receive underscores the ineffectiveness of voluntary industry practices and highlights the need for additional safeguards. Although we adopted some rules in the *Report and Order* in this proceeding, they do not address other aspects of cramming which we now consider in the *Further Notice*, including growth in wireless cramming and how the Commission should address any cramming issues that develop for VoIP services. We believe that adopting the requirements as above will provide consumers with the additional safeguards they need to protect themselves from this risk.

B. Legal Basis

4. The legal basis for any action that may be taken pursuant to this FNPRM is contained in Sections 1-2, 4, 201, 258, and 403 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151-152, 154, 201, 258, and 403.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.⁴ The RFA generally

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 5 U.S.C. § 603(b)(3).

defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁶ Under the Small Business Act, a “small business concern” is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) meets any additional criteria established by the Small Business Administration (“SBA”).⁷ Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.⁸ The FNPRM seeks comment generally on mobile providers of voice, text and data services. However, as noted in Section IV of the FNPRM, we are seeking comment on the scope of entities that should be covered by the proposals contained therein.⁹

6. *Incumbent Local Exchange Carriers (“Incumbent LECs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁰ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1000 or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹¹ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹² Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the Notice. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small.¹³

7. *Competitive Local Exchange Carriers (“Competitive LECs”), Competitive Access Providers (“CAPs”), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁴ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant

⁵ 5 U.S.C. § 601(6).

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷ 15 U.S.C. § 632.

⁸ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs/faqindex.cfm?areaID=24> (revised Sept. 2009).

⁹ See *Order supra* section IV.

¹⁰ 13 C.F.R. § 121.201, NAICS code 517110.

¹¹ See Trends in Telephone Service at Table 5.3.

¹² See *id.*

¹³ See http://factfinder.census.gov/servlet/IBOTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

¹⁴ 13 C.F.R. § 121.201, NAICS code 517110.

Service Providers, and Other Local Service Providers can be considered small entities.¹⁵ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.¹⁶ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.¹⁷ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.¹⁸ In addition, 72 carriers have reported that they are Other Local Service Providers.¹⁹ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.²⁰ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the Notice.

8. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²¹ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities.²² According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.²³ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.²⁴ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the Notice.

9. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.²⁵ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”²⁶ Under the present and prior categories, the SBA has deemed a wireless business

¹⁵ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

¹⁶ See Trends in Telephone Service at Table 5.3.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ 13 C.F.R. § 121.201, NAICS code 517110.

²² See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

²³ See Trends in Telephone Service at Table 5.3.

²⁴ See *id.*

²⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”;
<http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

²⁶ U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”;
<http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”;
<http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

to be small if it has 1,500 or fewer employees.²⁷ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 show that there were 1,383 firms that operated that year.²⁸ Of those, 1,368 firms had fewer than 100 employees, and 15 firms had more than 100 employees. Thus, under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (“PCS”), and Specialized Mobile Radio (“SMR”) telephony services.²⁹ An estimated 261 of these firms have 1,500 or fewer employees and 152 firms have more than 1,500 employees.³⁰ Consequently, we estimate that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms are small.

10. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).³¹ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.³² According to Commission data, 434 carriers report that they are engaged in wireless telephony.³³ Of these, an estimated 222 have 1,500 or fewer employees, and 212 have more than 1,500 employees.³⁴ Therefore, we estimate that 222 of these entities can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

11. The *Further Notice* contains proposals that: (1) a carrier, if it already offers blocking, ask all new subscribers whether they would like to “opt-in” to blocking of third-party charges on their bills and record the subscriber’s election for purposes of blocking or not blocking third-party charges on that subscriber’s bill; and (2) carriers that already offer blocking include on all telephone bills and on their websites for use by existing customers, information about the option to block third-party charges from their telephone bills and record any subsequent request by a current customer to block or not block third-party charges on that subscriber’s bill.

12. These proposed rules may necessitate that some carriers make changes to their existing billing formats and/or disclosure materials which would impose some additional costs to carriers. For example, to provide the required charge blocking option information on their bills may necessitate changes to billing formats. However, some carriers may already be in compliance with many of these requirements and therefore, no additional compliance efforts will be required.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

²⁷ 13 C.F.R. § 121.201, NAICS code 517210 (“2007 NAICS”). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

²⁸ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo=id=&-fds=name=EC0700A1&-skip=700&-ds=name=EC0751SSSZ5&-lang=en.

²⁹ See Trends in Telephone Service at Table 5.3.

³⁰ See *id.*

³¹ 13 C.F.R. § 121.201, NAICS code 517210.

³² *Id.*

³³ Trends in Telephone Service at Table 5.3.

³⁴ *Id.*

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³⁵

14. The Commission believes that any economic burden these proposed rules may have on carriers is outweighed by the benefits to consumers. However, in the *Further Notice* the Commission specifically asks how to minimize the economic impact of our proposals. For instance, we seek comment on the specific costs of the measures we discuss in the *Further Notice*, and ways we might mitigate any implementation costs. We also particularly ask whether smaller carriers face unique implementation costs and, if so, how the Commission might address those concerns.³⁶ In addition, for example, we seek comment on alternatives for how a carrier should obtain a consumer's opt-in to third-party charges, if the Commission decides to adopt an "opt-in" approach.³⁷ Finally, we seek comment on the overall economic impact these proposed rules may have on carriers because we seek to minimize all costs associated with these proposed rules.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

15. None.

³⁵ 5 U.S.C. § 603(c).

³⁶ See *Further Notice supra* ¶142.

³⁷ See *Further Notice supra* ¶141.

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), Consumer Information and Disclosure, Truth-in-Billing and Billing Format*; CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170.

Today we take another step forward in the Commission's Consumer Empowerment Agenda as we unanimously adopt rules to stop cramming – the placement of unauthorized charges on telephone bills.

What's cramming? One victim put it well in a letter to the FCC. Getting crammed is like getting a charge on your credit card bill "for a meal you never ate at a restaurant you've never been to."

Cramming is a big issue. It causes billions of dollars of financial damage annually for wireline telephone consumers, according to a Senate Commerce Committee staff report.

Cramming is widespread, extending from residential telephone lines to government lines to small business lines. The owner of several Krispy Kreme franchises was hit with \$4,000 worth of charges for e-faxes and other services that were never used or authorized.

Last year, as a result of investigations led by our Enforcement Bureau, the Commission issued forfeitures totaling over \$11.5 million against four crammers.

The Senate Commerce Committee has been focused on this issue, and its Majority Staff has issued an important and compelling report.

But the record in this proceeding makes clear that, while our enforcement efforts have helped, more needs to be done.

To protect consumers, we need to do two things: help consumers identify these charges when they appear on telephone bills, and prevent them from appearing on their telephone bills in the first place.

The rules we adopt today will do both.

They will require wireline carriers to clearly and conspicuously notify consumers that the carriers can block third party charges – meaning that consumers can stop these charges before they occur.

Our new rules will also require carriers to separate non-telecom third-party charges – such as e-Faxes – from regular charges to make it easier for consumers to spot cramming when they review their bills.

Importantly, this enhanced disclosure applies whether consumers receive their bills by paper or online. This is consistent with our general recognition that in the digital era our rules should reflect digital realities and opportunities – and as many as 20% of consumers have signed up for e-billing.

I applaud those wireline carriers that are stepping forward and implementing new measures to protect their customers from unauthorized third-party charges. AT&T, CenturyLink, and Verizon have each acknowledged the cramming problem and announced plans to stop placing some third-party charges on their telephone bills later this year. These are important and commendable steps, and I encourage other carriers to step forward and join these leaders.

Meanwhile, we will remain focused on consumer protection and empowerment, and, uniform rules for all carriers will help ensure that all consumers receive additional protection from unauthorized charges on their wireline telephone bills.

The new rules we adopt today aren't the end of our work. The Further Notice of Proposed Rulemaking we issue seeks comment on additional steps to tackle this problem. In particular, we ask exactly how such measures might work, how effective they might be at protecting consumers, how they could be implemented, and how costly they might be. For example, we ask whether ensuring that consumers opt-in before being billed for different types of third-party charges would offer further protection against cramming.

We also seek comment on wireless cramming, as we look into whether that is becoming a consumer issue. There should be no doubt: if the record in the FNPRM demonstrates a problem, we will act. I know the same is true of the Federal Trade Commission and state agencies, which have also taken significant enforcement actions in this area.

The Senate Commerce Committee has done very important work in shining a light on this and other consumer issues. The Senate Commerce Committee hearings and majority staff report have been instrumental in informing this proceeding and our actions today.

I should also note that this is not the first time the Commission has addressed cramming. Going back more than a decade, the Commission has facilitated voluntary industry efforts, adopted rules, and taken enforcement actions against carriers. And, as I mentioned, last year the Commission issued significant forfeitures.

I thank my colleagues for their excellent input on this item, and for sending a clear message that this Commission will continue to act on behalf of consumers. I thank our Consumer and Governmental Affairs Bureau for their hard work on behalf of consumers, to date and going forward – and for the diligent efforts of staff across the Commission on this item.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), Consumer Information and Disclosure, Truth-in-Billing and Billing Format*; CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170.

Consumers have complained for well over a decade about being surprised to find various unauthorized charges popping up on their telephone bills. This practice commonly has been referred to as "cramming". Dating back to 1999, the FCC began adopting various "Truth-in-Billing" rules to protect consumers from cramming practices. Nevertheless, according to the FCC's records and numerous consumer complaints, it appears that "cramming" continues to vex consumers.¹

Accordingly, I vote to approve today's report and order and further notice of proposed rulemaking. I was pleased that the report and order takes a narrower approach by focusing merely on disclosure requirements for wireline carriers, and wireline carriers only, instead of expanding these requirements to wireless and VOIP providers which have not experienced as high a consumer complaint rate compared to the wireline industry.

The order will make it easier for consumers to detect unauthorized charges on their wireline phone bills. Furthermore, our action will ensure that consumers are alerted of blocking options by wireline carriers that provide such blocking capabilities. This, in turn, will empower consumers to shield themselves from the practice of unauthorized charges being "crammed" on their wireline telephone bills.

Additionally, I note that prior to our action today, some carriers have already agreed to various voluntary efforts such as implementing consumer education efforts for consumers and launching an opt-in process. Furthermore, some carriers have even announced their intent to end the practice of placing third party charges for "miscellaneous" or "enhanced" services on their phone bills.

As for the issues discussed in the further notice, the Commission must keep in mind that new regulations almost always cause collateral and unpredictable economic effects. Therefore, it is my hope that the Commission will keep this law of bureaucratic physics in mind during any continued examination of cramming because regulatory burdens are ultimately passed on to consumers as additional costs. In that regard, I encourage any stakeholders that are concerned about costs of potential regulations to provide such burden estimates for the record. Also, if further action is deemed necessary and appropriate, the Commission must be ever vigilant in ensuring that it does not tread beyond its legal authority.²

I thank the Chairman and the Consumer Bureau staff for their efforts to find a narrow solution to thwart unauthorized cramming practices. I also would like to recognize the long hours spent by the majority staff of the Senate Commerce Committee to craft their report on the scope of the cramming problem and the negative effects of cramming on consumers.

¹ Interestingly, however, according to the Bureau staff's analysis of the FCC's quarterly reports on informal consumer inquiries and complaints, the number of complaints received by the FCC regarding cramming dipped to approximately 1,700 complaints in 2011 compared to the higher complaint numbers in the previous three years (2,157 in 2008, 3,181 in 2009 and 2,516 in 2010).

² For example, the further notice explores whether the Commission should impose a requirement that third party charges would only be permitted if a consumer elected to "opt in". In that context, the further notice points out that such an "opt in" regime would go beyond bill format and transparency issues and therefore raises questions as to whether the FCC would be exceeding its authority under Section 201(b) of the Act. 47 U.S.C. 201(b).

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming") Consumer Information and Disclosure; Truth-in-Billing and Billing Format, CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170.*

Cramming for wireline customers continues to be a problem, so I am pleased that we are moving forward with some very basic consumer protections. The action we take today builds upon the significant work of the Senate Commerce Committee in its investigation on cramming. While some carriers recently announced that they are discontinuing certain third party billing services, the rules we adopt will give the customers of those carriers that continue to offer third-party billing of non-telecom services better tools than they currently have today.

First, the education of consumers through carrier disclosures will help wireline consumers take advantage of the blocking that's already available from providers. It may also have the added benefit of educating consumers that third-party charges may appear on their bills, so they can be on the look out for such charges. Second, the requirement that wireline carriers separate third-party charges on their bills for non-telecom services will help consumers spot cramming. This will allow the industry to be more responsive to consumers who discover unauthorized charges on their bills. Those disputes can then be resolved more quickly, and consumers can avoid paying for services or goods they did not order.

Our action today is just an initial step, in that we will continue to evaluate other measures that could protect consumers, such as a requirement that consumers opt-in to third-party charges. In addition, we are seeking comment on the rising level of wireless cramming complaints. The number of CMRS complaints almost doubled last year at the FCC, and several states are investigating wireless cramming. As is well known, most Americans are wireless customers, and for those who are low-income, cramming can be especially harmful. Thus, it is my hope that commenters will address these issues in the Further Notice. I thank the Chairman and Commissioner McDowell for accommodating my request to seek further comment about cramming in the CMRS industry. I wish to also thank the Bureau staff for its diligent work in this proceeding. I look forward to the next steps in further ensuring that all consumers are protected from unauthorized third-party charges on their telephone bills.

